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No. 92-1189

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

COLUMBUS-AMERICA DISCOVERY GROUP, INC.,
Petitioner,

—v.—

ATLANTIC MUTUAL INSURANCE COMPANY, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Should courts cast aside the law of salvage and, instead, apply the law of finds even where the owner of sunken property files claim, proves ownership and shows positive intent not to abandon—and even though the law of finds previously has been applied only when an owner of a long sunken wreck no longer exists or files no claim?

2. Whether sunken property can be considered "abandoned" even though:

    a) owner files claim in admiralty proceeding;

    b) sufficient documentary evidence is provided to prove ownership;

    c) the evidence indicates predisposition by the owner not to abandon; and

    d) the property was taken by *force majeure* (hurricane) and it has been technologically impossible to recover until recently?

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RESPONDENTS' BRIEF IN OPPOSITION

JURISDICTION

No jurisdictional basis exists for granting the Petition for a Writ of Certiorari. The Court of Appeals for the Fourth Circuit did not enter judgment; it simply remanded this case for further proceedings by the trial court. Furthermore, there is no conflict among the United States Courts of Appeals and this case does not involve an important question of federal law. *See* Sup. Ct. R. 10.1(a)-(c).

STATEMENT OF THE CASE

This is an Admiralty Rule C[1] *in rem* action to enforce a maritime lien for salvage with respect to the S.S. CENTRAL AMERICA which sank in a hurricane in 1857. Petitioner, Columbus-America Discovery Group [hereinafter "CADG"], gave notice of this action to some of the owners of a commercial shipment of specie which had been on board. The owners [hereinafter "Respondents"] promptly filed claims in the proceeding. The trial court bifurcated the proceedings: first, a trial on the question of ownership and abandonment and, second, a salvage award proceeding. In the first phase, Respondents introduced corporate documents, public records and other evidence proving that they had insured the commercial shipment of $1,219,189.00, that they had paid claims, and thus they became the owners. (Pet. App. 28a.) Evidence also was introduced regarding recovery efforts showing that the insurers had no intention of abandoning such a valuable cargo. (Pet. App. 32a-33a.) The district court found that Respondents had insured and paid for the loss of the treasure but that they had abandoned their interest. Title to the insured shipment was awarded to CADG under the law of finds. (Pet. App. 102a.)

The Court of Appeals for the Fourth Circuit reversed in part and remanded the matter for a salvage award proceeding. (Pet. App. 7a, 28a, 34a.) The court upheld the finding of the lower court that the insurers had paid claims and became owners of the commercial shipment. (Pet. App. 29a.) The finding of abandonment by the lower court was reversed as clearly erroneous, and the application of the law of finds was held to be improper. (Pet. App. 31a-34a.)

CADG's request for rehearing and suggestion for a rehearing *en banc* were denied. (Pet. App. 110a.) No request for a stay of the proceedings was made to the Fourth Circuit and the matter has been remanded to the lower court for a salvage award pro-

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[1] Fed. R. Civ. P. Supplemental Rules for Certain Admiralty and Maritime Claims.

ceeding. Trial has been set for June 29, 1993, and discovery is proceeding.[2]

REASONS FOR DENYING THE WRIT

CADG seeks to terminate rights of owners of sunken property by overturning established admiralty law. To succeed, CADG would re-write the law governing recovered property lost at sea by applying the law of finds in an unprecedented manner.

This matter involves rights to sunken treasure on the Outer-Continental Shelf, outside the territorial waters of the United States.[3] CADG is not satisfied with an equitable salvage award but seeks title to the entire treasure.[4] There are no special or important reasons for granting a writ of certiorari in this case. There are no conflicts whatsoever among the circuits with respect to the applicable law nor is there a state court decision involved. All of the circuit court decisions relied on by CADG involve cases **where no owner was present** and, therefore, the law of finds was properly applied therein.[5] In this case, however, **proven owners were present.**

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[2] Columbia University, Harry John and Jack Grimm have intervened in the proceedings claiming part of the salvage award based on allegations CADG used information taken from Columbia University to find the wreck. Their rights are not addressed in the petition.

[3] *See* discussion *infra* pp. 9-10. The Abandoned Shipwreck Act of 1987, 43 U.S.C. §§2101-2106 (1988), does not apply to the CENTRAL AMERICA.

[4] CADG may receive "by far the largest share" of the treasure on remand. (Pet. App. 34a, 36a.)

[5] *Martha's Vineyard Scuba Headquarters, Inc. v. Unidentified, Wrecked and Abandoned Steam Vessel*, 833 F.2d 1059, 1065 (1st Cir. 1987) ("no person or firm appeared to assert any overall claim of ownership"); *Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel*, 640 F.2d 560 (5th Cir.) (*Treasure Salvors III*), *on remand*, 546 F. Supp. 919 (S.D. Fla. 1981) (parties stipulated that wreck of the ATOCHA was abandoned by original owners); *Klein v. Unidentified Wrecked and Abandoned Sailing Vessel*, 758 F.2d 1511 (11th Cir. 1985) (no original owner of 240 year old wreck; dispute between salvor and state). *See* discussion *infra* pp. 5-6.

At trial, over 500 exhibits were introduced in addition to testimony of a maritime archeologist, a fiscal historian and marine insurance experts. The district court concluded that Respondents were the owners of the commercial shipment. (Pet. App. 95a.) This finding on ownership was upheld by the Fourth Circuit. (Pet. App. 28a.) By referring to Respondents as "purported owners," CADG reveals what it is actually seeking—yet another review of the factual issue of ownership. CADG seeks to make this Court a trier of fact. While granting of a writ is discretionary, a grant of a writ to review evidence or specific facts is generally not warranted. *United States v. Johnston*, 268 U.S. 220, 227 (1925). *See Texas v. Mead*, 465 U.S. 1041 (1984).

Because this matter is on remand and there is no final judgment, this matter is not yet ripe for review by this Court. *Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967). There are no grave matters of importance in this case which warrant the issuance of a writ prior to final judgment.

I. Admiralty Courts Are Uniform in Their Application of the Law of Salvage and the Law of Finds

CADG attempts to manufacture a conflict among the United States Courts of Appeals regarding application of the law of salvage and the law of finds, even though no conflict exists. Admiralty courts have been uniform in their application of the law of salvage and the law of finds. The Fourth Circuit's opinion is consistent with all other courts of appeals in applying the law of salvage to property in which an owner asserts a claim; those courts applied the law of finds only to unclaimed property. Where the law of salvage provides an adequate remedy for the disposition of sunken property, salvage concepts and proceedings are applied. *Cobb Coin Co. v. Unidentified, Wrecked and Abandoned Sailing Vessel*, 549 F. Supp. 540, 556 (S.D. Fla. 1982).

> [A]dmiralty has historically disfavored the law of finds, preferring instead the distinct policies of the law of salvage.

Hener v. United States, 525 F. Supp. 350, 355 (S.D.N.Y. 1981). The law of salvage applies in all but the most extraordinary circumstances. *Id.* (Pet. App. 16a-17a.)

When the owner comes forward and makes an appearance, all courts have uniformly applied the law of salvage. *Hener, supra*, at 358; T. Schoenbaum, *Admiralty and Maritime Law* 514 (1987); (Pet. App. 22a.) The general rule requires that the law of finds is applied only "in extreme cases where the property is wholly derelict and *affirmatively* abandoned by the owners and underwriters." *Brady v. S.S. AFRICAN QUEEN*, 179 F. Supp. 321, 324 (E.D. Va. 1960) (emphasis added). *See also Zych v. Unidentified, Wrecked and Abandoned Vessel*, 755 F. Supp. 213, 214 (N.D. Ill. 1991), *vacated and remanded on other grounds*, 960 F.2d 665 (7th Cir.), *cert. denied*, 113 S. Ct. 491 (1992). A finding of affirmative abandonment is a prerequisite to awarding title to a salvor, when an owner is present. (Pet. App. 21a.)

The law of finds, under which a salvor may gain title, is an exception to the traditional application of the law of salvage and has been applied where no owner has come forward and where no owner is likely to do so. *Commonwealth v. Maritime Underwater Surveys, Inc.*, 531 N.E.2d 549, 551 (Mass. 1988). *See also Klein v. Unidentified Wrecked and Abandoned Sailing Vessel*, 758 F.2d 1511, 1514 (11th Cir. 1985) (existence of owner was a fiction); *Treasure Salvors v. Unidentified, Wrecked and Abandoned Sailing Vessel*, 556 F. Supp. 1319, 1334 (S.D. Fla. 1983) (vessel indisputably abandoned; owner not in existence). Generally, in such cases, the contest was between competing salvors or between the salvor and the sovereign, particularly state governments. In any event, no owner appeared. Courts have inferred abandonment in such cases, as did both lower court decisions in this case with respect to passenger gold.

The courts have awarded title to salvaged property to the salvor only in cases where no claim of ownership was asserted by the owner or where there has been an affirmative abandonment. (Pet. App. 21a.) In the cases relied upon by CADG, the owners no longer existed, and their existence was deemed "a fiction."[6] The salvor was awarded title so as to avoid the administrative inconvenience of a salvage award proceeding and sale. This line of cases has no application to a proceeding where owners appear promptly upon legal notice after the property is brought into the jurisdiction of the court and ownership is proven, as occurred in this case.

The district court decision stood alone in awarding title to a treasure hunter based on the law of finds, despite the presence of proven owners in the proceeding. (Pet. App. 22a.) The Court of Appeals properly reversed an opinion that broke with admiralty precedent. There is no conflict whatsoever as a result of the Fourth Circuit opinion. The application of the law of finds is not "foreclosed" as CADG argues. The law of finds may be applied to wrecks when the existence of the owner is a "fiction." The law of finds does apply to unclaimed passenger gold on the CENTRAL AMERICA, but not to the commercial shipment that was insured by Respondents.[7] (Pet. App. 27a, 28a.)

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[6] For example, no owner asserted any claim to the S.S. REPUBLIC. *Martha's Vineyard Scuba Headquarters, Inc. v. Unidentified, Wrecked and Abandoned Steam Vessel*, 833 F.2d 1059, 1065 (1st Cir. 1987). In *Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel*, 640 F.2d 560 (5th Cir. 1981) (*Treasure Salvors III*), *on remand*, 546 F. Supp. 919 (S.D. Fla. 1981), it was *stipulated* that the vessel was abandoned and no owner appeared. *See* Pet. App. 22a.

[7] The lower court's application of the law of finds and inference of abandonment as to the vessel, artifacts and passenger gold was specifically upheld by the Fourth Circuit. (Pet. App. 28a.)

II. The Fourth Circuit Properly Required Clear and Convincing Evidence of Abandonment

The Fourth Circuit correctly held that when an owner claims long-lost property that was involuntarily taken from his control, the law is hesitant to find an abandonment and such must be proved by clear and convincing evidence. (Pet. App. 34a.)

A fundamental maxim of a free government is that the right of private property remains sacred. *Stanley v. Colt*, 72 U.S. (5 Wall.) 119 (1866). Ownership is the collection of rights to use and enjoy property. *Black's Law Dictionary* 1106 (6th ed. 1990). Abandonment is the repudiation of ownership. *Florida Dep't of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 677 n.8 (1982). There must be clear and convincing evidence of abandonment in order to deprive an owner of his rights. (Pet. App. 20a.) There is a strong natural presumption that property is not abandoned and the party alleging abandonment must produce clear evidence of the owner's intent to abandon property. *Wilson v. Colorado Mining Co.*, 227 F. 721, 725 (8th Cir. 1915); *accord United States v. Robinson*, 430 F.2d 1141, 1143 (6th Cir. 1970) (party seeking to establish abandonment has an "especially heavy burden"); T. Schoenbaum, *Admiralty and Maritime Law* 512 (1987) (same). Abandonment must be voluntary and involves a positive intention to part with ownership. *Hoelzer v. City of Stamford, Conn.*, 722 F. Supp. 1106, 1111 (S.D.N.Y. 1989), *aff'd*, 933 F.2d 1131 (2d Cir. 1991). While abandonment may be inferred from the surrounding facts and circumstances when no owner appears in an *in rem* proceeding, there is no authority to do so when an owner appears in the proceeding, establishes his ownership, and there is no showing of affirmative abandonment.

CADG asks the Court to do the unthinkable—to impose a judicial statute of limitations on ownership. CADG confuses a claim against a third party, which can be forfeited by inaction, with ownership which can only be lost by voluntary relinquishment. Ownership is not a claim against a third party

which terminates if it is not exercised. It is a right lost only by clear and express renunciation.

The Court of Appeals concluded that a serious mistake had been made and reversed the district court's finding of abandonment because there was no evidence to support it. (Pet. App. 31a, 34a.) Not only was the property taken from the owners' possession by an act of God, but the technology to recover it from a depth of 8,000 feet was only recently developed. Further, all evidence points to an intent not to abandon. Respondents' actions showed a positive "pre-disposition not to abandon." (Pet. App. 32a.)

CADG's concern about overburdened courts is misplaced. It is CADG's conduct in this matter, which if successful, would lead to increased litigation.[8] Application of the law of finds to cases in which owners are still in existence will only serve to encourage treasure hunters to attempt to defeat owners' claims in court. Instead of resolving these matters commercially through contracts, salvors would be encouraged to litigate title in most cases, creating an unnecessary burden on the courts. The time-honored tradition of cooperation between salvors and underwriters would be undermined[9] and courts flooded with unnecessary litigation.

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[8] Few similar cases have been reported due in part to the normal commercial resolution of such matters by underwriters. The only comparable example involved the rights to the LADY ELGIN which sank 130 years ago. Sufficient documentation for proof of ownership was provided by owners in that case as well. *Zych, supra*, at 215. (Pet. App. 31a.) *See also United States v. Steinmetz*, 973 F.2d 212 (3d Cir. 1992) (involving federal government), *petition for cert. filed*, 61 U.S.L.W. 3404 (U.S. Nov. 18, 1992) (No. 92-859).

[9] The Salvage Association in London has entered into contracts on behalf of underwriters for salvage on sunken wrecks dating back to the 1700's. The litigation herein could have been easily avoided if CADG had contracted with Respondents and resolved this matter commercially in the normal course of business.

III. Court Of Appeals Decision Promotes Historic Preservation and Uniformity in Admiralty Law

Through the rules of salvage, admiralty courts have been able to provide an equitable means of balancing the individual rights of the salvor with the rights of the owner of salvaged property. By precedents that have served the maritime industry well for centuries, the law imposes a lien on the salvaged property to protect the claim of the salvor and requires the salvor to act as a fiduciary in protecting the property for the owner. The law of finds has only been applied to resolve the problem faced when no owner can be found or the owner has affirmatively repudiated title to the property. (Pet. App. 16a-20a.)

International uniformity in admiralty and marine insurance matters is essential to maritime commerce. In England, as here, the rule is that no abandonment occurs unless there is some overt act which clearly constitutes abandonment. (J.A. 423-24, Aff. of English Law.)[10] The High Court of Australia and others have taken the same position.[11] The opinion below is in complete conformity with national and international admiralty practice.

CADG complains that the decision of the Court of Appeals upholding traditional admiralty law will somehow "confuse" public administration of historic shipwrecks under the Abandoned Shipwreck Act of 1987, 43 U.S.C. §§ 2101-2106 (1988) [hereinafter "ASA"]. However, ASA specifically does not apply to shipwrecks on the Outer-Continental Shelf where the

[10] "There are special reasons for keeping in harmony with the marine insurance laws of England, the great field of this business." *Queen Ins. Co. of America v. Globe & Rutgers Fire Ins. Co.*, 263 U.S. 487, 493 (1924).

[11] In *Robinson v. Western Australian Museum*, 16 A.L.R. 623 (1977) (Austl.), the original owner retained title to the GILT DRAGON which sank in 1656. *See* pp. 647, 648, 654, 663, 671, 673-74. *See also Simon v. Taylor*, [1975] 2 Lloyd's Rep. 338 (Sing. Ct. 1974).

CENTRAL AMERICA lies. 43 U.S.C. § 2106(b). Furthermore, neither the law of finds nor the law of salvage applies to shipwrecks covered by ASA. 43 U.S.C. § 2106(a). Nevertheless, CADG argues erroneously that management of historic shipwrecks under ASA will be adversely affected.

Both the express statutory language and the legislative history of ASA indicate that in order for a shipwreck to be abandoned, it must "have been deserted" and the owner must have "relinquished ownership rights with no retention." 43 U.S.C. § 2101(b). *See also* S. Rep. No. 241, 100th Cong., 2d Sess. 5 (1987) (clarifying abandonment).[12] With respect to shipwrecks covered by ASA, Congress is assumed to use the term "abandonment" to include centuries of admiralty legal practice. *See Morissette v. United States*, 342 U.S. 246, 263 (1952); *Miles v. Apex Marine Corp.*, 498 U.S. 19, 111 S. Ct. 317, 325 (1990). The Fourth Circuit opinion is in conformity with the Abandoned Shipwreck Act Guidelines promulgated by the Department of the Interior[13] and with the law maritime which requires clear and convincing evidence of abandonment when an owner appears.[14]

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[12] Initial versions of this legislation would have included any shipwreck over 100 years of age as historic and left the determination of abandonment to the Secretary of the Interior. *See* H.R. 132, 97th Cong., 1st Sess. (1981), introduced by Mr. Bennett on January 5, 1981. This approach was rejected in the final legislation which left the determination of abandonment to the courts.

[13] "When the owner of a sunken vessel is paid the full value of the vessel (such as receiving payment from an insurance underwriter) the shipwreck is not considered to be abandoned. In such cases, title to the wrecked vessel is passed to the party who paid the owner." 55 Fed. Reg. 50,116, 50,120-21 (1990).

[14] This is not to say that abandonment may never be inferred now, as CADG argues. The Court of Appeals acknowledges that abandonment may be inferred when no owner exists or comes forward to assert a claim and, following such precedent, upheld the lower court's inference of abandonment with respect to passenger gold, artifacts, and the hull of the CENTRAL AMERICA. (Pet. App. 28a.)

Historic preservation of shipwrecks, especially those not subject to ASA, such as the CENTRAL AMERICA, is best encouraged by the approach set forth by the Fourth Circuit which specifically listed the care taken by the salvor in preserving historical material as a factor to be considered in determining the size of the salvage award. In treasure salvage cases, the extent to which the historical value of the wreck and of the artifacts are preserved for the public good is a factor to be considered in setting the salvage award. (Pet. App. 35a-36a.) Through its equitable powers, an admiralty court applying salvage law may reward such efforts. If, however, courts applied the law of finds, title would pass entirely to the treasure hunter, with no supervision whatsoever of the preservation of historical treasures *See Hener v. United States*, 525 F. Supp. 350 (S.D.N.Y. 1981); (Pet. App. 36a); *Cobb Coin Co. v. Unidentified, Wrecked and Abandoned Sailing Vessel*, 549 F. Supp. 540 (S.D. Fla. 1982). The interests of uniformity in admiralty law, of the maritime community, and of historic preservation of shipwrecks are well served by the reasoned opinion below.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully Submitted,

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February 16, 1993

APPENDIX

APPENDIX

List of parent companies and subsidiaries of Respondents pursuant to Sup. Ct. R. 29.1

The following Respondents do not have any parent companies or subsidiaries (not wholly owned):

Atlantic Mutual Insurance Company
Salvage Association
Superintendent of Insurance of the State of New York

The following are parent or subsidiary companies (not wholly owned) of the remaining Respondents:

Insurance Company of North America—CIGNA Corporation (parent)

The London Assurance—Sun Alliance Group plc (parent),
—Protea Assurance Company Limited (subsidiary)

Alliance Assurance Company, Ltd.—Sun Alliance Group plc (parent)

Indemnity Marine Insurance, Ltd.—Commercial Union plc (parent)

Marine Insurance Company, Ltd.—Royal Insurance Holdings plc (parent)

Royal Exchange Assurance—Guardian Royal Exchange Assurance plc (parent)